

Before The
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
AirTouch Communications, Inc., and) CC Docket Nos. 97-213
Motorola, Inc.) 97-356
Joint Petition for an Extension of the CALEA)
Assistance Capability Compliance Date)
)
To: The Commission)

**JOINT PETITION FOR AN EXTENSION OF THE
CALEA ASSISTANCE CAPABILITY COMPLIANCE DATE**

AirTouch Communications, Inc.

Pamela Riley
David A. Gross
1818 N. Street, N.W., Suite 800
Washington, D.C. 20036
(202) 293-3800

Michael Mowery
2999 Oak Road, MS1025
Walnut Creek, CA 94596
(510) 210-3804

Motorola, Inc.

Mary Brooner
1350 Eye Street, N.W., Suite 400
Washington, D.C. 20005
(202) 371-6899

Stewart A. Baker
Thomas M. Barba
Gwendolyn Prothro
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

1 of 2 pages rec'd 049
CODE

TABLE OF CONTENTS

SUMMARY	i
I. INTRODUCTION & BACKGROUND	2
II. THE COMMISSION SHOULD GRANT PETITIONERS' REQUEST FOR AN EXTENSION UNDER SECTION 107(C) OF CALEA BECAUSE COMPLIANCE IS NOT REASONABLY ACHIEVABLE THROUGH APPLICATION OF TECHNOLOGY AVAILABLE WITHIN THE COMPLIANCE PERIOD	5
III. REQUEST FOR RELIEF	16

SUMMARY

The Communications Assistance for Law Enforcement Act ("CALEA") authorizes the Commission to grant an extension of the assistance capability compliance deadline set forth in CALEA "if the Commission determines that compliance . . . is not reasonably achievable through application of technology available within the compliance period." Section 107(c) of CALEA; 47 U.S.C. § 1006(c). It is undisputed that CALEA compliant technology will not be available by October 25, 1998. Therefore, CALEA compliance "is not reasonably achievable through application of technology available within the compliance period." Accordingly, Petitioners submit that under the plain language of the statute they are entitled to receive an extension of the assistance capability compliance date. In addition, Petitioners have made good faith reasonable and substantial efforts to implement CALEA's assistance capability provisions.

Petitioners respectfully request under Section 107(c) of CALEA a two year extension of the compliance deadline based on the finding that compliance is not reasonably achievable through application of technology available within the compliance period. Petitioners further request prompt Commission action on this petition for extension so parties can exercise their right to appellate review prior to the expiration of the current October 25, 1998 deadline. Petitioners also recommend that the Commission grant a similar extension to other CMRS providers using the same switching equipment that AirTouch Communications, Inc. utilizes. These carriers are identically situated and no purpose would be served by having them prepare and the Commission review large numbers of essentially redundant extension requests.

Before The
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
AirTouch Communications, Inc., and)	CC Docket Nos. 97-213
Motorola, Inc.)	97-356
Joint Petition for an Extension of the CALEA)	
Assistance Capability Compliance Date)	
)	
To: The Commission)	

**JOINT PETITION FOR AN EXTENSION OF THE
CALEA ASSISTANCE CAPABILITY COMPLIANCE DATE**

Pursuant to Section 107(c) of the Communications Assistance for Law
Enforcement Act ("CALEA"),¹ Section 1006(c) of the Communications Act, AirTouch
Communications, Inc. ("AirTouch")² and Motorola, Inc. ("Motorola")³ hereby respectfully
petition the Commission to extend by two years the compliance date imposed by Section 111(b)
of CALEA. By this petition, AirTouch also seeks an extension for its equipment manufactured

¹ See Public Law 103-414, 108 Stat. 4279 (1994). CALEA is codified in various portions of Titles 18 and 47 of the United States Code, including 47 U.S.C. §§ 1001-10.

² AirTouch is the licensee or the general partner/majority owner in numerous cellular licenses. AirTouch is subject to CALEA's requirements because it is a telecommunications carrier as defined by CALEA. See Section 102(8) of CALEA; 47 U.S.C. § 1001(8) ("The term 'telecommunications carrier' . . . includes a person or entity engaged in providing commercial mobile service.").

³ Motorola, a leading telecommunications manufacturer in the United States, designs, manufacturers, and delivers transmission and switching equipment, public and private networks, data networking systems, business telephone systems, microelectronic components, communications systems and software, two-way radios, pagers, personal communications systems, cellular telephones and systems, discrete semiconductors and integrated circuits, computers, data communications, and information processing and handling equipment. Motorola has provided or contracted to provide AirTouch Motorola's EMX 2500 and EMX 5000 cellular switching platforms, as well as other telecommunications equipment.

by Northern Telecom Inc. ("Nortel"), Ericsson, Inc. ("Ericsson"), and Lucent Technologies, Inc. ("Lucent").⁴

As demonstrated in this petition, in the attached declaration of Motorola Cellular Infrastructure Group Engineer David Cushman ("Motorola Declaration"), and in the attached correspondence from Nortel, an extension is warranted because compliance "is not reasonably achievable through the application of technology available within the compliance period."⁵

I. INTRODUCTION & BACKGROUND

1. Congress enacted CALEA in 1994 to respond to law enforcement's reported difficulties in performing effective surveillance of communications employing new technologies and enhanced services, while at the same time protecting privacy and encouraging technological innovation.⁶ CALEA imposes two different law enforcement "assistance" obligations on

⁴ With regard to equipment manufactured by Lucent and Ericsson, AirTouch seeks an extension on the grounds articulated in their extension petition of March 30, 1998, submitted jointly with AT&T Wireless Services, Inc. With regard to Nortel equipment, AirTouch seeks an extension on the same statutory grounds. As articulated in correspondence from Nortel to AirTouch, Nortel has advised AirTouch that CALEA-compliant technology will not be available by October 25, 1998. See Nortel Correspondence to Michael Mowery of AirTouch (May 5, 1998).

⁵ Section 107(c)(2) of CALEA; 47 U.S.C. § 1006(c)(2). Petitioners recognize that the FCC has recently asked for comment, *inter alia*, concerning filings made regarding the compliance deadline and the need for an extension of the October 1998 compliance deadline. See *Public Notice*, Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, DA 98-762 (April 20, 1998). Petitioners intend to offer comments urging the Commission to act promptly on carrier requests and to consider an industry-wide extension of the compliance deadline. Out of an abundance of caution, however, Petitioners are also filing the instant petition under Section 107(c) of CALEA.

⁶ Congress sought to balance three "key policies" with CALEA: "(1) to preserve narrowly focused capability for law enforcement to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (Continued ...)

carriers: (1) an assistance *capability* requirement, wherein carriers are required to provide certain interception capabilities to law enforcement;⁷ and (2) a *capacity* requirement, wherein carriers are required under certain circumstances to provide these capabilities in quantities which the government specifies.⁸

2. Congress established a framework within which CALEA was to be implemented. It charged the Attorney General, who has assigned her responsibilities to the Federal Bureau of Investigation ("FBI"), to determine law enforcement's capacity requirements "after notice and comment" and "after consulting with . . . telecommunications carriers."⁹ Congress charged the industry with determining how to implement the assistance capability requirements.¹⁰ Finally, Congress charged the Commission with the responsibility to resolve any

(3) to avoid impeding the development of new communications services and technologies." H.R. Rep. No. 103-827, at 13 (1994) ("House Report"), *reprinted in* 1994 U.S.C.C.A.N. 3489.

⁷ Section 103(a) of CALEA; 47 U.S.C. § 1002(a).

⁸ *See* Section 104(b) of CALEA; 47 U.S.C. § 1003(b). Carriers are under no obligation to expand their capacity to meet law enforcement requirements *unless* the government agrees to "reimburse a carrier for costs directly associated with modifications to attain such capacity requirements that are determined to be reasonable." Section 104(e) of CALEA; 47 U.S.C. § 1003(e).

⁹ Section 104(a)(1) of CALEA; 47 U.S.C. § 1003(a)(1).

¹⁰ Congress expressly prohibited law enforcement agencies from requiring carriers to adopt "any specific design of equipment, facilities, services, features, or system configuration." Section 103(b)(1) of CALEA; 47 U.S.C. § 1002(b)(1). *See also* FBI/DOJ CALEA Implementation Report at 4 (Jan. 26, 1998) ("[S]ection 103 of CALEA prohibits law enforcement from requiring specific solution requirements.").

disputes over the adequacy of the industry's standards implementing the assistance capability requirements.¹¹

3. Congress established a phased implementation schedule to ensure the appropriate implementation of CALEA. Understanding the interrelationship between capability and capacity, Congress directed the FBI to publish law enforcement's capacity requirements within one year -- that is, by October 25, 1995 (giving industry an opportunity to consider law enforcement's needs in engineering cost-effective solutions for satisfying the capability requirements). Congress gave the industry three additional years -- until October 25, 1998 -- within which to design and implement network modifications implementing CALEA's capability and capacity requirements.¹² As carriers naturally upgraded and replaced their network infrastructure, they were to be replacing old noncompliant equipment with new compliant equipment, without significant financial burden.

4. Congress recognized, however, that the temporal sequencing established for introducing technical assistance solutions could be disrupted, and it authorized the Commission to grant "one or more extensions" of the compliance date if it determines that compliance "is not reasonably achievable through application of technology available within the compliance period."¹³

¹¹ See Section 107(b) of CALEA; 47 U.S.C. § 1006(b).

¹² See Section 111(b) of CALEA; 47 U.S.C. § 1001 note.

¹³ Section 107(c)(1)-(2) of CALEA; 47 U.S.C. § 1006(c)(1) and (2).

II. THE COMMISSION SHOULD GRANT PETITIONERS' REQUEST FOR AN EXTENSION UNDER SECTION 107(C) OF CALEA BECAUSE COMPLIANCE IS NOT REASONABLY ACHIEVABLE THROUGH APPLICATION OF TECHNOLOGY AVAILABLE WITHIN THE COMPLIANCE PERIOD

5. CALEA has not been implemented as Congress envisioned. The Congressionally-designed phased CALEA implementation plan has not been met because of unavoidable circumstances and delays beyond the industry's control. First, the final notice of capacity requirements was published more than two years late, and when finally published, was incomplete, thus hindering the development of capability requirements that would take into account law enforcement's capacity needs. Second, and more significantly, the capability requirements have yet to be defined; there is no agreement even as to what CALEA requires.

6. It is undisputed that CALEA-compliant technology will not be available by October 25, 1998.¹⁴ Compliance is not "reasonably achievable through application of technology available within the compliance period."¹⁵ Therefore, applying the plain and clear terms of the statute, the Commission should grant an extension of the compliance deadline.

7. Although not a requirement for an extension under the terms of the statute, Petitioners submit that, for more than three years, they have made good faith reasonable and substantial efforts to implement CALEA's assistance provisions, as discussed more fully below.

¹⁴ See, e.g., FBI/DOJ Implementation Report (Jan. 26, 1998); TIA Petition for Rulemaking (Apr. 2, 1998); AT&T Petition for Extension (Mar. 30, 1998); CDT Petition for Rulemaking (March 26, 1998); AirTouch Comments, CC Docket No. 97-213, at 4 (Dec. 12, 1997) ("even the FBI acknowledged during a November 14, 1997 meeting with industry that CALEA's current compliance date of October 25, 1998 cannot now be met"); Motorola Declaration ¶ 31; Nortel Correspondence to AirTouch (May 5, 1998).

¹⁵ Section 107(c)(2) of CALEA; 47 U.S.C. § 1006(c)(2).

8. Even before CALEA was enacted, the telecommunications industry began exploring CALEA architecture solutions; participating in the formation of Electronic Communications Service Providers (“ECSP”) action teams to identify expected issues relating to evolving CALEA requirements; and addressing the issues raised by the impending passage of CALEA.¹⁶ After CALEA’s enactment, the ECSP members continued to meet monthly.¹⁷

9. Upon passage of CALEA, the telecommunications industry promptly selected the Telecommunications Industry Association (“TIA”) to serve as the “industry association or standard-setting organization” for the issuance of a CALEA technical requirements standard.¹⁸ In early 1995, TIA initiated a standards program under the auspices of the TIA Subcommittee TR45.2, with the intent to complete the standard on an expedited basis.¹⁹ TR45.2 produced a draft standard, PN-3580, in late 1995, approximately one year after CALEA’s enactment.

10. Subcommittee TR45.2 deferred balloting this early draft, however, so as to allow the FBI an opportunity to contribute to the standard, as it had requested. The FBI sought to participate actively in the standards setting process. Although the statute expressly left standard-setting to industry, the industry allowed the FBI to participate in the hope that all interested parties could cooperate to formulate a consensus standard and avoid challenges and review by the Commission, allowing a more prompt implementation of the standard. However,

¹⁶ Motorola Declaration ¶¶ 4-5.

¹⁷ *Id.* ¶ 6.

¹⁸ TIA is an institution accredited by the American National Standards Institute (“ANSI”).

¹⁹ Motorola participated actively in that process. Motorola Declaration ¶¶ 7-11.

the FBI's participation, and the prolonged negotiations that ensued, caused substantial delay in the standard setting process; and ultimately, the cooperative efforts proved unavailing.

11. Several months after balloting of the TIA draft had been deferred, in the summer of 1996,²⁰ the FBI submitted to TIA its own proposal for a standard, an Electronic Surveillance Interface ("ESI") document, considerably more expansive than TIA's PN-3580. Although the industry believed that many of the requirements in the FBI's ESI were not mandated by CALEA, the industry sought to reach a consensus standard with the FBI by attempting to reconcile PN-3580 with ESI.²¹

12. Industry and law enforcement held diverging views as to the appropriate standard, but more fundamentally, as to the very meaning and scope of CALEA's requirements.²² The industry emphasized the carefully balanced scope of CALEA, Congress' expressed intent that "the assistance requirements [stated in the statute] be both a floor and a

²⁰ The FBI provided the ESI document to industry on May 16, 1996, on a need-to-know basis, and did not allow TR45.2 to discuss the document during the May meeting because it had not yet been released. The FBI representatives brought a few copies of the ESI document to the July 1996 meeting, but because there were not enough copies to be distributed, the TR45.2 members were unable to review or comment on the document. The FBI supplied copies of its ESI document, and the document was discussed, at the August 1996 TR45.2 meeting.

²¹ In the spirit of negotiation, during the September 1996 TR45.2 meeting, the industry proposed to include the expansive items requested by the FBI in its ESI document as an annex to PN-3580. Development as to the CALEA-required items could thus proceed on schedule while the industry and the FBI negotiated the addition of the annex ESI items. *See* Motorola Declaration ¶ 11.

²² Congress established a procedure under which law enforcement could petition the Commission if it believed that the industry standard was deficient. Section 107(b) of CALEA; 47 U.S.C. § 1006(b). Had the FBI sought to resolve the fundamental differences in understanding through a challenge before the Commission years ago rather than weeks ago, both industry and law enforcement may have been able to implement CALEA by October 1998.

ceiling,” and Congress’ cautioning “against overbroad interpretation of the requirements.”²³ The FBI, on the other hand, argued that law enforcement was to define the assistance capability requirements: “law enforcement officers are the experts in, and end-use recipients of, the electronic surveillance solutions being developed.... The point is: the requirements are law enforcement’s, and how they are to be implemented is for the telecommunications industry to decide. But, the industry cannot decide not to implement important portions of law enforcement’s interception requirements.”²⁴

13. After a year and a half of discussions and attempts by industry to reach a compromise, in March 1997, the industry submitted its revised standard proposal, SP-3580, for an ANSI ballot.²⁵ Although SP-3580 embodied nearly 90 percent of the CALEA features on which the industry and the FBI worked out an agreement, the FBI opposed the proposed standard because it did not include eleven additional items requested by law enforcement (the “punch

²³ H.R. Rep. 103-827, at 22.

²⁴ FCC NPRM FBI Reply Comments, at 8. Representative Barr has charged that “law enforcement has been using CALEA to overreach, and that the FBI is looking to use CALEA for the perfect solution to their wiretapping wishes. Indeed, many of the so-called ‘punch-list’ items clearly are beyond the scope of the Act.” Conference Report on H.R. 2267, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (House of Representatives- November 13, 1997). *See also* Letter from the Hon. Patrick Leahy to the Hon. Janet Reno and the Hon. Louis Freeh at 2 (Feb. 4, 1998) (the FBI’s demand for enhanced capabilities goes “far beyond the scope and intent of CALEA”).

²⁵ Around the same time period, the FBI sought to revoke TIA’s ANSI accreditation. The FBI withdrew its challenge two months later, after having placed a strain on law enforcement-industry relations and having achieved only a further delay in the CALEA implementation process. The FBI has since then characterized the challenge as “unfortunate.” *See* Testimony of H. Michael Warren, Section Chief, FBI CALEA Implementation Section, before the House Judiciary Subcommittee on Crime (Oct. 27, 1997).

list”).²⁶ Despite strong support from the telecommunications industry, the standard did not receive the “consensus” necessary to be promulgated as an ANSI standard because of law enforcement opposition.²⁷

14. Committee TR45.2 revised its SP-3580 proposal in response to law enforcement comments received, and submitted SP-3580A for an ANSI vote in the summer of 1997. Again, the proposed standard failed to receive consensus because of law enforcement opposition. Meanwhile, privacy groups began to argue that the industry had gone too far, had wrongfully expanded the scope of CALEA, and had infringed on consumers’ privacy rights.

15. On December 8, 1997, after more extended negotiations and substantial but unsuccessful efforts to reach a compromise, TIA and the Alliance for Telecommunications Industry Solutions (“ATIS”), jointly published interim/trial-use industry standard J-STD-025. This standard, at least for telephony, provided the first benchmark against which manufacturers could build. However, after several months of apparent indecision, law enforcement challenged

²⁶ The FBI sought provisions to ensure access to the communications of all parties in a conference call supported by the subscriber’s service or facilities; information indicating whether a party is connected to a multi-party call at any given time; feature keys; notification messages for in-band and out-of-band signaling; speedy delivery of call-identifying information; automated reporting of surveillance status; feature status; and access to all subject-initiated dialing and signaling activity. There remains confusion as to the number of punch list items sought by the FBI. In a letter by Assistant Attorney General Stephen R. Colgate, the FBI appeared to drop from the punch list two of the original eleven requirements. However, the FBI’s deficiency petition suggests that law enforcement is again seeking at least ten if not more capability items.

²⁷ Thirty-five of the 94 ballots received on SP-3580 were “no” votes from law enforcement agencies, the overwhelming majority of which had not previously participated in the standard setting process and many of which had submitted “no” votes using the FBI’s form statement of opposition.

the standard before the Commission, immediately after a deficiency petition taking the opposite position was filed by the Center for Democracy and Technology (“CDT”).²⁸

16. When significant differences first emerged between the industry and law enforcement in the understanding of CALEA’s requirements, and as negotiations between industry and law enforcement prolonged, manufacturers decided to proceed with the development of CALEA-compliant architecture designs without waiting for a stable standard. Industry representatives, including Motorola, devoted many thousands of person-hours of scarce engineer time (skills recognized as virtually impossible to find in any quantity in today’s tight market for electrical engineers and software programmers/engineers) for CALEA research and development.²⁹ Motorola engineers planned, designed, and developed baseline architecture solutions as well as alternative solutions based on a moving CALEA capabilities target.³⁰ They

²⁸ As the Commission is aware, in its March 26, 1998 petition, the CDT contends that two provisions of J-STD-025 regarding “location” and “packet data” exceed the scope of CALEA. The CDT also urges the Commission to:

reject any request by the FBI or other agencies to expand further the surveillance capabilities of the Nation’s telecommunications systems ... [and to] find compliance with the assistance capability requirements not reasonably achievable for equipment, facilities, and services installed or deployed after January 1, 1995, and indefinitely delay implementation of the statute, while industry develops a narrowly focused standard.

CDT Petition for Rulemaking (Mar. 26, 1998).

²⁹ Several engineers at Motorola dedicated their time entirely to developing CALEA solutions, foregoing the opportunity to develop other technology which Motorola customers and the market actually demanded. Motorola Declaration ¶¶ 14-15, 26.

³⁰ *Id.* ¶¶ 16-19.

even attempted to pursue development of systems requirements, system functional specification and coding.³¹

17. However, the manufacturers have proceeded as far as they can with development of CALEA solutions in the face of the current uncertainty. They cannot proceed any further with development because the interim standard, challenged as both over- and under-inclusive, is unstable, and the very meaning and scope of the assistance requirements have yet to be defined, creating great uncertainty about whether Motorola and other manufacturers will have to modify their solutions. Any modification of the challenged standard may require substantial changes in manufacturers' CALEA solutions—even if only a modest portion of the standard is altered, compliance with and implementation of new and different requirements could require scrapping, undoing and redoing much of the prior development.

18. While manufacturers and their engineers willingly committed substantial time and resources to planning (and re-planning) to a moving target standard, they cannot proceed further in the development of CALEA-compliant technology in the face of current uncertainty.³² Proceeding further with development would require manufacturers to commit additional valuable engineering resources, suffer further opportunity costs, and to become exposed to significant and potentially wasteful expense—contrary to CALEA's express goals of achieving implementation

³¹ *Id.* ¶¶ 20-23.

³² *Id.* ¶¶ 24-28.

by cost effective methods without increasing the burden on customers and without hindering the provision of other new technologies and services to carriers³³ and the public.

19. Moreover, proceeding further in the face of uncertainty is likely to lead industry participants to develop non-uniform solutions to CALEA. AirTouch networks inter-mix different manufacturers' devices. Such devices must be interoperable. Subtle design differences can cause system incompatibility, network unreliability, and even failure, none of which would promote communications assistance for law enforcement.³⁴ In sum, law enforcement would not be well served, or "assisted," if there are as many interface solutions as there are wireless markets, which could happen without a uniform approach.³⁵

20. An additional factor delaying implementation of CALEA solutions was the Attorney General's failure to publish in a timely manner a notice setting forth the system wiretap capacity for all telecommunication systems covered by the statute. Capacity and capability are interrelated—the appropriate design to support 25 wiretaps per switch may well be different from the design to support 5 wiretaps per switch³⁶—thus the Attorney General's delay further

³³ The uncertainty has obviously also had a negative impact on carriers who fully intend to comply with CALEA's assistance capability provisions.

³⁴ Motorola Declaration ¶ 28.

³⁵ Indeed, the absence of a uniform approach to communications assistance for law enforcement was a driving force behind the enactment of CALEA. *See* H.R. Rep. 103-827, at 15 ("The industry maintains that its companies have a long tradition of working with law enforcement under current law to resolve technical issues. However, with the proliferation of services and service providers, such a company-by-company approach is becoming increasingly untenable").

³⁶ More dramatically, in the Los Angeles market, for example, the appropriate design to support 167 wiretaps per switch may well be different from the design to support 5 wiretaps per switch.

hindered the progress of the capability requirements development.³⁷ The Attorney General did not publish the notice of capacity requirements for telephony by October 25, 1995, as intended by the statute, and was unable to do so until March 1998.³⁸ Moreover, the March notice is limited to requirements for telephony, ignoring any requirements for other technologies such as paging, satellite and other types of mobile radio service.³⁹ Finally, there remain issues with regard to law enforcement's capacity needs, aggravating the uncertainty as to the scope of capability requirements.⁴⁰

21. The FBI and Department of Justice themselves have recognized that the industry needs guidance before it can finalize and deploy its CALEA solutions, and that the prolonged negotiations have delayed implementation of the Act's assistance capability requirements.⁴¹ The FBI and Department of Justice have also acknowledged industry

³⁷ Motorola Declaration ¶ 29.

³⁸ 62 Fed. Reg. 12218 (Mar. 12, 1998). Two preliminary notices were published before the final notice, the second calling for substantially larger capacity requirements than the first.

³⁹ The March notice is limited to those "services that are of most immediate concern to law enforcement—that is, those telecommunications carriers offering local exchange services and certain commercial mobile radio services, specifically cellular and personal communications service (PCS)." 62 Fed. Reg. at 12220.

⁴⁰ Cf. Correspondence from Albert Gidari, on behalf of Cellular Telecommunications Industry Association ("CTIA"), to H. Michael Warren, Section Chief, FBI CALEA Implementation Section (Mar. 28, 1998).

⁴¹ "The product manufacturing and deployment schedules to produce the software and hardware necessary to comply with CALEA must be set in motion well in advance of the date that the technology actually becomes publicly available for use. If the deficiencies in the TIA interim standard are not addressed immediately, law enforcement, telecommunications carriers, and equipment manufacturers will be uncertain as to how to proceed." FBI/DOJ Joint Petition for

(Continued ...)

participants' good faith efforts in working to implement CALEA.⁴²

22. Thus, it is clear that manufacturers cannot complete their design work and begin production until the Commission resolves the current controversy surrounding CALEA technical requirements by deciding what capabilities CALEA does and does not require. Only after the scope of CALEA is defined and the standard dispute resolved will manufacturers be able to complete their developmental work and begin producing CALEA modifications for distribution to carriers.⁴³

23. All of these steps take time. Indeed, the FBI and Department of Justice have acknowledged that industry will require "a reasonable time for compliance" once stable standards are published, and have suggested that manufacturers would require 18 months

Expedited Rulemaking, at 64-65. Even the Attorney General noted in her testimony before Congress that, to build CALEA compliant equipment and software, the industry will require, first, that the Commission make a final decision as to compliance, and then, an additional 18 months to comply with the Commission's decision. *See* Testimony of the Attorney General Before the House Appropriations Subcommittee for Commerce, State, Justice, the Judiciary, and Related Agencies (February 26, 1998).

⁴² In its January 1998 Implementation Report, the FBI noted the "good faith efforts of solution providers and carriers in developing a CALEA solution [and] ... the substantial progress made to date...." Implementation Report, at 15 and 2.

⁴³ Petitioners recognize that CALEA provides that the "absence of technical requirements or standards or implementing the assistance capability requirements of section 103 shall not— (A) preclude a telecommunications carrier, manufacturer, or telecommunications support services provider from deploying a technology or service; or (B) relieve a carrier, manufacturer, or telecommunications support services provider of the obligations imposed by section 103 or 106, as applicable." Section 107(a)(3) of CALEA; 47 U.S.C. § 1006(a)(3). Petitioners do not seek relief from their respective obligations to implement CALEA's technical assistance requirements under Sections 103 or 106. Rather, Petitioners simply seek an extension (of the effective date set forth in Section 111(b)), as expressly provided by CALEA when deployment of the CALEA assistance capability and capacity solutions has been delayed. Section 107(c) of CALEA; 47 U.S.C. § 1006(c).

following standards publication to begin producing CALEA compliant equipment.⁴⁴

Manufacturers consistently have stated they will need “24-30 months of development before [they] can even release a software package containing new features.”⁴⁵ Finally, additional time must be set aside for carriers to acquire, install, and test the new CALEA modifications.

24. In the end, one point is clear and uncontested: CALEA compliant equipment will not be available in time for the current October 25, 1998 compliance date and an extension is necessary under Section 107(c) of CALEA.

25. Petitioners respectfully request under Section 107(c) of CALEA a two year⁴⁶ extension of the carrier compliance deadline based on the finding that compliance is not reasonably achievable through application of technology available within the compliance period.⁴⁷

⁴⁴ FBI/DOJ Joint Petition for Rulemaking at 63. *See also* Testimony of the Attorney General Before the House Appropriates Subcommittee for Commerce, State, Justice, the Judiciary, and Related Agencies (Feb. 26, 1998).

⁴⁵ TIA Comments, CC Docket No. 97-213, at 9 (Dec. 12, 1997); Motorola Declaration ¶ 30.

⁴⁶ CALEA provides that the Commission may grant an extension under Section 107(c) for no more than two years, but allows Petitioners to seek additional extensions if two years are not sufficient. Petitioners expressly reserve the right to seek additional extensions under the statute.

⁴⁷ While not relevant to the statutory standard for an extension, it bears noting that law enforcement will not be harmed by grant of this petition. Law enforcement will be capable of using CALEA-compliant interceptions *only* if it has access to equipment capable of receiving interceptions in the CALEA format. However, it appears that law enforcement has not yet even executed contracts for the development of needed CALEA-compliant collection equipment. *See, e.g.,* TIA Rulemaking Petition at 8-9 n.12 (April 2, 1998); AT&T Extension Petition at 6 n.5 (March 30, 1998).

III. REQUEST FOR RELIEF

26. WHEREFORE, for the foregoing reasons, AirTouch and Motorola respectfully request that the Commission extend by two years the CALEA capabilities assistance compliance date.⁴⁸ Petitioners request that the Commission act promptly on this request, and well in advance of the current compliance deadline so the unsuccessful party has a meaningful opportunity to exercise its rights to appellate review.⁴⁹

27. Finally, other carriers using the same equipment as AirTouch face the identical situation as AirTouch. Administrative efficiency would suggest that the Commission therefore grant an extension to all carriers using the equipment utilized by AirTouch.⁵⁰

⁴⁸ As noted above, AirTouch also respectfully requests an extension for its equipment manufactured by Nortel, Ericsson, and Lucent Technologies.

⁴⁹ CALEA specifies that the Commission may grant an extension only "after consultation with the Attorney General." Section 107(c)(2) of CALEA; 47 U.S.C. § 1006(c)(2). To expedite review of this petition, Petitioners are also serving a copy of the petition on the Attorney General, the FBI, and the Department of Justice.

⁵⁰ The FBI has taken the position that the Commission cannot grant blanket extensions and that it must therefore entertain and act on thousands of extension requests from carriers using the same equipment and relying on identical facts. *See* Reply Comments at iii and 12 ¶ 19 (Feb. 11, 1998). Petitioners submit that Congress did not intend such an unnecessary and costly procedure. The specified circumstances which have delayed Petitioners' implementation of CALEA's assistance provisions have similarly delayed every other carrier, manufacturer, and telecommunications industry participant. Just as law enforcement sought an industry-wide solution to its surveillance problems when a "company-by-company approach [wa]s becoming increasingly untenable," H.R. Rep. 103-827, at 15, Petitioners seek an industry-wide solution to the issues raised by the unavoidable delay in the implementation of CALEA. In any event, Congress also gave the Commission authority under Section 106(b)(5) of CALEA to enter an industry-wide extension. *See* 47 U.S.C. §§ 223, 1006(b)(5), and 1006(c). *See generally* CTIA/PCIA/USTA, Response to Rulemaking Petitions, at 13 n.30 (Apr. 9, 1998).

Respectfully submitted,

AirTouch Communications, Inc.

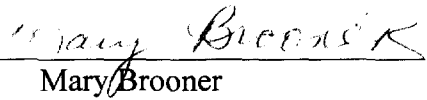

By: Pamela Riley

David A. Gross
1818 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 293-3800

Michael Mowery
2999 Oak Road, MS1025
Walnut Creek, CA 94596
(510) 210-3804

Attorneys for AirTouch

Motorola, Inc.


By: Mary Brooner

1350 Eye Street, N.W., Suite 400
Washington, D.C. 20005
(202) 371-6899

Stewart A. Baker
Thomas M. Barba
Gwendolyn Prothro
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8127

Attorneys for Motorola

May 5, 1998

**Declaration of David Cushman of Motorola, Inc. in Support of AirTouch Communications,
Inc. and Motorola, Inc. Joint Petition for an Extension of the CALEA Assistance
Capability Compliance Date**

I, David Cushman, submit this declaration in support of the Petition for Extension of the CALEA Assistance Capability Deadline submitted jointly by AirTouch Communications, Inc. ("AirTouch") and Motorola, Inc. ("Motorola"):

1. I am an engineer with the Motorola Cellular Infrastructure Group ("CIG") and submit this declaration in support of the joint petition for an extension of the CALEA assistance capability compliance deadline of October 25, 1998.

2. I am familiar with Motorola's efforts to implement the Communications Assistance for Law Enforcement Act ("CALEA") and the matters set forth in this declaration.

3. Motorola, a leading telecommunications manufacturer in the United States, designs and manufactures transmission and switching equipment, public and private networks, data networking systems, business telephone systems, microelectronic components, communications systems and software, two-way radios, pagers, personal communications systems, cellular telephonics and systems, discrete semiconductors and integrated circuits, computers, data communications, and information processing and handling equipment.

4. Motorola began exploring CALEA architecture solutions even before CALEA was enacted. For example, in July and August 1994, Motorola-CIG conducted for AirTouch an analysis of its system architecture to determine how it might support advanced surveillance for law enforcement in the Motorola cellular system.

5. In September 1994, Motorola participated in the formation of Electronic Communications Service Providers ("ECSP") action teams to identify expected issues relating to evolving CALEA requirements and how to address most efficiently the issues raised by the impending passage of CALEA. ECSP members reviewed various preliminary architecture proposals, including a proposal submitted by Motorola.

6. After CALEA's enactment, Motorola continued to participate in ECSP's monthly meetings.

7. In October 1994, the telecommunications industry selected the Telecommunications Industry Association ("TIA"), an institution accredited by the American National Standards Association ("ANSI"), to serve as the industry standard-setting organization

for the issuance of a CALEA technical requirements standard. In early 1995, TIA initiated a standards program under the auspices of the TIA Subcommittee TR45.2.

8. TIA's efforts were initially limited to developing a standard for the wireless telephone industry; Committee T-1 of the Alliance for Telecommunications Industry Solutions ("ATIS") was to develop a standard for the wireline industry. TR45.2 and Committee T-1 later decided to combine their efforts and establish a joint standard for both the wireline and wireless industries, with TR45.2 taking the lead.

9. Motorola participated actively in the industry standard-setting process; for example, company personnel attended the TIA Subcommittee TR45.2 meetings, engaged in numerous internal and industry meetings and discussions on CALEA, prepared and circulated internally and within industry memoranda and papers on developing CALEA solutions, and called on its engineers to devote extended periods of time working on solutions to identified issues and challenges related to CALEA.

10. In the summer of 1996, the FBI submitted to TIA its own proposal for a standard, an Electronic Surveillance Interface ("ESI") document, which was more expansive than TIA's PN-3580. Although Motorola and others in industry believed that many of the requirements in the FBI's ESI were not mandated by CALEA, industry sought to reach a consensus standard with the FBI by attempting to reconcile PN-3580 with ESI.

11. During the September 1996 TR45.2 meeting, the industry proposed to include the expansive items requested by the FBI in its ESI document as an annex to PN-3580. Development as to the CALEA-required items could thus proceed on schedule while the industry and the FBI negotiated the addition of the annex ESI items.

12. In March 1997, after a year and a half of discussions and attempts by industry to reach a compromise, industry submitted its revised standard proposal, SP-3580, for an ANSI ballot. The FBI opposed the standard because it did not include eleven additional items requested by law enforcement.

13. Despite strong support from the industry, the standard did not receive the "consensus" necessary to promulgate it as an ANSI standard because of the FBI's opposition—thirty-five of the 94 ballots received on SP-3580 were "no" votes from law enforcement agencies, the majority of which had not previously participated in the standard setting process and many of which had submitted "no" votes using the FBI's form statement of opposition. Committee TR45.2 revised its SP-3580 proposal in response to law enforcement comments received, and submitted SP-3580A for an ANSI vote in the summer of 1997. Again, the proposed standard did not receive consensus because of law enforcement opposition.

14. In addition to its participation in the standard-setting process, Motorola undertook significant, resource-intensive activities to develop its CALEA solutions.

When the standard-setting process suffered delays, Motorola augmented its developmental efforts.

15. Motorola devoted many thousands of person-hours of scarce engineer time – skills recognized as virtually impossible to find in any quantity in today's tight market for electrical engineers and software programmers/engineers – for CALEA research and development.

16. In April 1996, Motorola-CIG established a cross-functional architecture team to work on developing alternative CALEA architecture solutions. The team contained at least one development expert from each Motorola cellular system functional area that might be affected by the Motorola CALEA solutions.

17. In July 1996 the Motorola development team reached Stage 1 of its CALEA solutions development, having completed: (i) a high level description of the challenge it was addressing; (ii) a description of the existing cellular system baseline architecture; (iii) an explicit list of the requirements drawn from the appropriate "feature" defining documents (including PN-3580 and ESI), showing how the overall system is affected; (iv) decision vectors determining the criteria against which alternative architecture proposals would be evaluated; and (v) a schedule and work effort estimate for completing the architecture proposal phase of development.

18. The development team continued to work on CALEA and plan to the moving target, reaching Stage 2 in September 1996, having completed: (i) a detailed description of the baseline architecture and architecture alternatives addressing the problem statement and the defined requirements; (ii) sufficient detail with which to evaluate the alternatives against the decision criteria formulated in Stage 1; (iii) preliminary costs estimates; and (iv) a rollout plan for each architecture alternative. The team produced the baseline architecture as well as several alternative architecture solutions, rating the alternative solutions according to the decision criteria formulated.

19. The development team completed the architecture phase of development by late 1996, and submitted its selected best architecture solution for engineering consideration.

20. Once approval of the proposed architecture was received, the development team began developing the system requirements. To launch this phase of development, however, the team required clear and certain technical requirement input criteria.

21. In January 1997, Motorola decided, in order to be able to make available to its customers any CALEA-related capabilities in a timely manner, to proceed with development based on the most current industry standard available, Revision 10 of proposed standard 3580. In addition, at that time, it was widely believed that Revision 10 would become the consensus capabilities standard.

22. The Motorola development team completed its system requirements document by the spring of 1997, and then launched the system specification stage of development.

23. In 1997, the uncertainty as to the capability requirements increased dramatically. Revision 10 of the industry standard was replaced by Revisions 11, 12, and 13, and then by the interim standard J-STD-025. Negotiation with law enforcement was dragging. The interim standard itself came under attack by the FBI, which began to speak of challenging the standard before the Commission. The meaning and scope of CALEA's requirements were uncertain. The industry standard is now being challenged before the Commission as both over- and under-inclusive, and the scope of CALEA is being litigated.

24. Any modification of the challenged interim capability standard may require substantial changes in Motorola's CALEA solutions. Even if only a modest portion of the standard is altered, compliance with and implementation of new and different requirements could require scrapping, undoing, and redoing much of the prior development.

25. While Motorola and its engineers willingly committed substantial time and resources to planning (and re-planning) to a moving target standard, they cannot proceed further in the development of CALEA solutions without incurring substantial costs and additional risks.

26. Motorola has already committed substantial time and resources to planning its CALEA solutions. Several of its engineers have dedicated their time entirely to developing CALEA-compliant technology. Motorola has already suffered significant opportunity costs. Indeed, whatever reasonable charge is ultimately established for this equipment could not compensate Motorola for the opportunity costs it has suffered, the profit it would have made in developing and selling equipment containing features actually sought by its customers and the market.

27. Proceeding further in the development of CALEA-compliant technology in the face of the current uncertainty would require Motorola to commit additional valuable engineering resources, to suffer further opportunity costs, and to become exposed to significant and potentially wasteful expense.

28. Proceeding further with current development in the face of uncertainty is likely to lead industry participants to develop non-uniform solutions to CALEA. For example, most carrier networks inter-mix telecommunications equipment produced by different manufacturers. Such equipment must be interoperable. Failure to ensure uniform engineering solutions will increase the risk of system incompatibility, network unreliability, and customer service failures. Lack of uniformity could also lead to as many interface solutions as there are wireless markets.

29. Motorola's attempt to design efficient, cost-effective CALEA solutions has also been hampered by the FBI's delay in publishing law enforcement's capacity requirements. Capacity and capability are interrelated; for example, the appropriate design to support 25 wiretaps per switch may well be different from the design to support 5 wiretaps per switch.

30. Motorola, like other manufacturers, generally needs 24 to 30 months to release a software package containing significant new features.

31. For the reasons described above, CALEA-compliant Motorola technology will not be available by October 25, 1998.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed 4 May, 1998.

A handwritten signature in cursive script, appearing to read "David Cushman", is written over a horizontal line.

David Cushman